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Congress of the United States
House of Representatives
Washington, DC 20515

March 19, 2019

CO-CHAIR, DEMOCRATIC POLICY AND
COMMUNICATIONS COMMITTEE

COMMITTEE ON THE JUDICIARY

RANKING MEMBER, SUBCOMMITTEE ON
REGULATORY REFORM, COMMERCIAL
AND ANTITRUST LAW

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON FOREIGN AFFAIRS

SUBCOMMITTEE ON
EUROPE, EURASIA, AND EMERGING THREATS

SUBCOMMITTEE ON MIDDLE EAST
AND NORTH AFRICA

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chairman Simons, Commissioner Chopra, Commissioner Phillips, Commissioner Slaughter, and Commissioner Wilson:

I write to urge the Commission to open an immediate investigation into whether Facebook has violated the antitrust laws.

It has been a year since news broke that Facebook exposed user data to Cambridge Analytica, a political consulting firm that sought to manipulate voter behavior.¹ Since then, a torrent of reports has revealed that the Cambridge Analytica scandal was part of a much broader pattern of

¹ Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 million Facebook Profiles harvested for Cambridge Analytica in major data breach*, THE GUARDIAN (Mar. 17, 2018), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

misconduct by Facebook.² This includes mounting evidence of anticompetitive behavior.³ Facebook's predatory acquisition strategy, foreclosure of rivals from its platform, and declining product quality strongly suggest that it has abused its position as a monopoly to undermine competition and the competitive process.

An antitrust investigation responding to these revelations should focus on at least three aspects of Facebook's conduct.

First, the Commission should examine whether any of Facebook's acquisitions substantially lessened competition in violation of Section 7 of the Clayton Act.⁴ Since its founding, Facebook has acquired over 75 companies.⁵ Two of the most significant purchases were Instagram, which Facebook bought in 2012 for \$1 billion, and WhatsApp, which Facebook purchased in 2014 for \$19 billion. Through these acquisitions, Facebook now owns three of the top four, and four of the top eight, social media apps.⁶

When Facebook acquired Instagram, the photo-based app posed a competitive threat.⁷ It was growing faster than even Facebook had at its peak and proved especially attractive to teenagers and young adults, a demographic Facebook was losing. Moreover, buying up Instagram enabled Facebook to make the switch to mobile, a market where Facebook was struggling to adapt. In

² See, e.g., Ryan Mac et al., *Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo – And Warned That Facebook Could Get People Killed*, BUZZFEED (Mar. 29, 2018), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data#.at6JrEZRk>; Hallie Detrick, *Facebook Is Sorry for Keeping the Videos You Thought You Deleted*, FORTUNE MAG. (Apr. 3, 2018), <http://fortune.com/2018/04/03/facebook-videos-delete-personal-data>; Matt Binder, *Facebook and Google accused of using 'dark patterns' to mislead users into sharing personal data*, MASHABLE (June 28, 2018), <https://mashable.com/2018/06/28/facebook-google-privacy-gdpr-deceived-by-design/#uVQFBHa0gmqg>; Sheera Frenkel et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>; Josh Constine, *Facebook pays teens to install VPN that spies on them*, TECHCRUNCH (Jan. 29, 2019), <https://techcrunch.com/2019/01/29/facebook-project-atlas/>. For an ongoing list, see FREEDOM FROM FACEBOOK, *Scandals*, <http://freedomfromfb.com/scandals> (last visited Mar. 18, 2019). This reporting has spurred investigations by a bipartisan group of 37 state attorneys general, the Justice Department, the Securities and Exchange Commission, and the FBI, as well as a host of foreign governments.

³ See, e.g., Note by Damian Collins, Member of Parliament, Chair, Digital, Culture, Media and Sport Committee, U.K. Parliament, and Selected Documents Ordered from Six4Three (Dec. 5, 2018), <https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf> [hereinafter "Six4Three"]; Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY L. & TECH. J. 39, 90-98 (2019).

⁴ 15 U.S.C. § 18 (2019).

⁵ *List of Facebook's 77 acquisitions*, CRUNCHBASE, https://www.crunchbase.com/search/acquisitions/field/organizations/num_acquisitions/facebook (last visited Mar. 18, 2019).

⁶ *Most Popular Mobile Social Networking Apps in the United States as of October 2018, by Monthly Users (in millions)*, STATISTA, <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/> (last visited Mar. 18, 2019).

⁷ Tim Wu, *The case for breaking up Facebook and Instagram*, WASH. POST (Sept. 28, 2018), <https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram>.

hindsight, it is clear that by approving this purchase, the Commission enabled Facebook to swallow up its most significant rival in the social network market.

WhatsApp, meanwhile, threatened to outdo Facebook Messenger. As documents released by the UK Parliament reveal, Facebook had been using its surveillance tool Onavo to obsessively track WhatsApp.⁸ By doing so it learned that WhatsApp's market reach was expanding steadily, outdoing then-popular apps like Foursquare and Tumblr while also beating out Facebook Messenger in certain markets.⁹ In other words, WhatsApp "was quickly demonstrating that it could compete with Facebook on its most important battleground."¹⁰ Instead of protecting this competition—as the antitrust laws require—the Commission permitted Facebook to neuter it. And while Facebook promised at the time of the acquisition that "nothing" will change for WhatsApp users' privacy,¹¹ it has since gone on to use WhatsApp users' data for marketing purposes—a breach of its commitment.¹²

Since the Commission generally does not share with the public its analysis justifying inaction, we do not know what led the agency to approve these acquisitions. But it is clear that allowing Facebook to purchase Instagram and WhatsApp has deprived users of critical competition. As Facebook's serial disregard for users' privacy has prompted some users to delete their Facebook accounts, they find themselves unable to escape Facebook's ecosystem.¹³ Given that Facebook used spyware to systematically track and target actual, potential, and nascent rivals, it is vital to

⁸ Six4Three, at 12-15. *See also* Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition from Startups*, WALL ST. J. (Aug. 9, 2017), <https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444>.

⁹ Six4Three, at 12-15.

¹⁰ Charlie Warzel & Ryan Mac, *These Confidential Charts Show Why Facebook Bought WhatsApp*, BUZZFEED (Dec. 5, 2018), <https://www.buzzfeednews.com/article/charliewarzel/why-facebook-bought-whatsapp>.

¹¹ Facebook, WHATSAPP BLOG (Feb. 19, 2014), <https://blog.whatsapp.com/499/Facebook; Jim Edwards, Zuckerberg: 'It's The Only App We've Ever Seen With Higher Engagement Than Facebook Itself>, BUS. INSIDER (Feb. 19, 2014), <https://www.businessinsider.com/facebooks-investor-call-on-whatsapp-acquisition-2014-2> ("No, [Zuckerberg] said, monetization was not an issue. Facebook isn't even thinking about that right now. And no, Facebook would not run ads on WhatsApp.").

¹² EPIC, *Facebook to Collect WhatsApp Data, Violating FTC Order and Privacy Promises* (Aug. 25, 2016), <https://epic.org/2016/08/facebook-to-collect-whatsapp-u.html> ("WhatsApp's recent announcement indicates users will have 30 days to opt-out of data transfers to Facebook, in violation of the law and the FTC's Order.").

¹³ Users who decided to quit Facebook in light of its privacy breaches discovered that cutting it out entirely would require also deleting Instagram and WhatsApp. *See* Will Oremus, *If You Delete Facebook, Do You Also Have to Delete Instagram and WhatsApp?*, SLATE (Dec. 22, 2018), <https://slate.com/technology/2018/12/can-you-deletfacebook-if- you-dont-also-delete-instagram-and-whatsapp.html>; *see also id.* ("After all, the unfortunate reality is that there aren't a lot of prominent social networks that Facebook doesn't own."). *See also* <https://marketingland.com/facebook-lost-15-million-users-marketers-remain-unfazed-258164>. It's also worth noting that Facebook collects data even on non-Facebook users. Kurt Wagner, *This Is How Facebook Collects Data on You Even If You Don't Have an Account*, RECODE (Apr. 20, 2018), <https://www.recode.net/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg> ("There is no way to opt out of this kind of data collection.").

examine whether any of Facebook’s acquisitions—including of smaller social networks—unlawfully lessened competition.¹⁴

Second, the agency should investigate whether Facebook has engaged in exclusionary conduct in violation of Section 5 of the Federal Trade Commission Act.¹⁵ Documents reveal that Facebook has responded to competitive threats by cutting them from its network. For example, when Vine, a social application through which users can make short videos, attempted to let users find friends through Facebook’s platform, Facebook quickly shut down the feature.¹⁶ The Commission should examine whether Facebook has weaponized application programming interfaces (APIs) to undermine competition.

Finally, the Commission should consider whether Facebook has abused its monopoly power in violation of Section 5 of the Federal Trade Commission Act.¹⁷ Experts have noted that while Facebook faced competition, it was not able to condition use of its network on constant surveillance; in fact, users expressly rejected this bargain.¹⁸ It was only after Facebook achieved a dominant position that it could successfully backtrack on privacy commitments and initiate widespread commercial surveillance of users.¹⁹ This dramatic decrease in privacy has amounted to quality degradation of Facebook’s service. The Commission should investigate whether Facebook is using its monopoly power to degrade quality below what a competitive marketplace would allow.

Thank you for your attention to this important matter. It is critical that the Commission robustly enforce the antitrust laws to prevent anticompetitive acquisitions and anticompetitive conduct.

¹⁴ For example, in 2017 Facebook acquired tbh, a small yet fast-growing startup that had proved popular with high school students and teenagers. Hamza Shaban, *What is TBH, Facebook’s newly acquired anonymous teen compliment app?*, WASH. POST (Oct. 17, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/10/17/tbh-facebooks-new-anonymous-teen-compliment-app-explained>. For an analysis of why the FTC should have scrutinized this acquisition, see Ben Thompson, *Why Facebook Shouldn’t Be Allowed to Buy tbh*, STRACHERY (Oct. 23, 2017), <https://stratichery.com/2017/why-facebook-shouldnt-be-allowed-to-buy-tbh/>. Less than a year after the acquisition, Facebook shut down tbh, citing “low usage.” Kaya Yurieff, *Facebook shuts the teen app it just bought*, CNN (July 3, 2018), <https://money.cnn.com/2018/07/03/technology/facebook-tbh-app-shut-down/index.html>.

¹⁵ 15 U.S.C. § 45(a)(1) (2019).

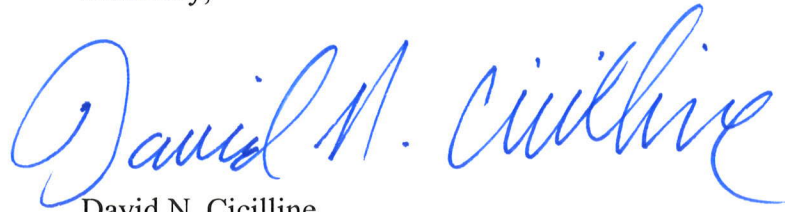
¹⁶ Six4Three, at 15, 43.

¹⁷ 15 U.S.C. § 45(a)(1).

¹⁸ Srinivasan, *supra* note 3, at 48-62.

¹⁹ *Id.* at 69-81.

Sincerely,



David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary

The Honorable Doug Collins, Ranking Member, Committee on the Judiciary

The Honorable F. James Sensenbrenner, Ranking Member, Subcommittee on Antitrust,
Commercial and Administrative Law

The Honorable Makan Delrahim, Assistant Attorney General, Department of Justice